

No. 87-2135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ISLAMIC REPUBLIC OF IRAN BROADCASTING,

Petitioner,

v.

N.K. BEHROOZIAN and JERRY ABITBOL,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Questions Presented

1. Does an evidentiary objection, raised for the first time on appeal, support a writ of certiorari?
2. Does IRIB's objection to its own proposed jury instruction, raised for the first time on appeal, support a writ of certiorari?

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The respondents N.K. Behroozian and Jerry Abitbol respectfully pray that the petition for a writ of certiorari be denied.

Statement of the Case

Islamic Republic of Iran Broadcasting ("IRIB") seeks review of a judgment of the Court of Appeals which affirmed a judgment on a jury verdict in a case which turned upon conflicting evidence and the credibility of witnesses.

The petition is frivolous. There are no issues meeting the criteria set forth in Supreme Court Rule 17. In IRIB's appeal to the Court of Appeals, IRIB indicated its awareness that no appealable issue had been preserved for

review,[1] but it proceeded with its appeal anyway. Now IRIB has filed a petition for a writ of certiorari with no issue which could support such a request. By filing, IRIB prolongs the interference with N.K. Behroozian's ("Behroozian") property (which is being held by Sotheby Parke Bernet, Inc., pending the conclusion of this litigation) and further increases the cost to Behroozian and Jerry Abitbol ("Abitbol") of this litigation.

In its Statement of the Case, IRIB portrays the trial as one at which IRIB presented evidence that it owned and did not transfer the violin, without contradiction by Behroozian and Abitbol. IRIB lost the case, according to its implication, because of the court's rulings.

This is untrue. During the trial IRIB prevailed on most issues of law. IRIB lost this case, not because of any ruling on the law, but because its witnesses were not credible.

Under Iranian law there was a legal presumption that Behroozian was the lawful owner of the violin. IRIB had the burden of proof to show that in the chain of title from IRIB to the Mostazafan Foundation ("Foundation") to Behroozian, the violin had left IRIB's offices by unlawful means.[2]

IRIB was unable to meet this burden. IRIB was unable to prove that the violin was ever at its office after the revolution in early 1979, or that the violin was transferred

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[1] See IRIB's September 15, 1987, Memorandum in Support of Motion for New Trial, at p. 5 ("a cursory review of the record immediately indicated the failure of prior counsel to file a motion for a new trial. Such review, in light of the failure to file such a motion, revealed no appealable issue."), and supporting Affidavit of Thomas Corcoran, Jr., ¶10.

[2] See Brief for Appellees in Court of Appeals, pp. 10-11. In its proposed jury instructions, IRIB stated that: "You are further instructed as a matter of law that a presumption of ownership exists in favor of Behroozian, by reason for him being in present possession of the instruments," (Court of Appeals Appendix A697) and the court so instructed the jury (A1503, 1548).

without authority. IRIB relied primarily upon two witnesses: Mohammed Biglaripour, who testified IRIB had possession of the violin in 1979; and Karim Khodapanahi, who testified that IRIB did not legally sell or transfer the violin.

These witnesses were not credible. They contradicted each other. Their testimony was controverted. The jury was justified in finding that they had testified falsely and in rejecting all of their testimony, leaving IRIB with no material evidence at all.

The factual discrepancies were addressed at length in the Brief for Appellees in the Court of Appeals (pp. 11-28).[3] The Court of Appeals recognized this in its opinion stating:

> The jury's interpretation of the varied and frequently conflicting documentary evidence and testimony is entitled to great weight. Nothing that the IRIB points out persuades us that the evidence was insufficient to support the jury's verdict. 839 F.2d 780, at 782.

The jury's verdict was amply supported by the legal presumption in favor of Behroozian and IRIB's factual failure to rebut that presumption.

The issues now raised by IRIB were not raised by IRIB during the trial. IRIB objects, based upon Fed. R. Civ. P. 44.1, to testimony given by Christian Bourguet, but no objection based upon Fed. R. Civ. P. 44.1 was made

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[3] For example, Khodapanahi testified that he saw the violin on a table between French attorney Christian Bourguet ("Bourguet") and former Iranian Foreign Minister Sadegh Ghotbzadeh. Mr. Bourguet testified at the trial and directly disputed Khodapanahi's claim. Mr. Bourguet made an excellent witness and provided the jury with ample reason to conclude that Khodapanahi was lying. The record is replete with other instances where the jury should have found that IRIB's witnesses had lied and that IRIB's claims were false.

during the trial. Similarly, IRIB now objects to its own proposed instruction on the law (which the trial court adopted), although it never objected to its proposed charge during the trial. These contentions are frivolous.

REASONS FOR DENYING THE WRIT

I. No Fed. R. Civ. P. 44.1 objection was made by IRIB during the trial nor was there a basis for such an objection.

IRIB claims that Mr. Bourguet testified about the governing law in violation of Fed. R. Civ. P. 44.1 and that IRIB objected to this testimony.

IRIB is wrong.

IRIB has seriously distorted the record by suggesting that it made an Fed. R. Civ. P. 44.1 objection during the trial. At no time did IRIB object that Mr. Bourguet was testifying about foreign law in violation of Fed. R. Civ. P. 44.1. This objection was made for the first time on appeal.

In fact, IRIB did not make a single objection during Mr. Bourguet's testimony. IRIB waived voir dire of Mr. Bourguet. IRIB did not object to a single question posed to Mr. Bourguet. IRIB did not move to strike any of Mr. Bourguet's answers. IRIB did not request any instructions to the jury regarding any of Mr. Bourguet's testimony.[4]

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[4] Although Mr. Bourguet did not testify about the governing law, and while no Fed. R. Civ. P. 44.1 objection was made, counsel for IRIB evidently had no objection to a witness testifying about the law in Iran. Counsel for IRIB asked Biglaripour about the existence of certain laws in Iran (A1027). Counsel for IRIB asked Khodapanahi about IRIB's regulations rather than requesting a ruling of law or relying upon his own legal submissions (A1093-1094, 1098, 1148). IRIB also introduced its own regulations into evidence as an exhibit (A1636-1650). (Predictably, given Khodapanahi's myriad inconsistencies, the regulations contradicted Khodapanahi.) IRIB continued to rely upon its testimony as to the law in Iran during summation (A1416, 1422).

Prior to Mr. Bourguet's testimony, IRIB objected to the introduction of certain documents describing confiscation of property in Iran. IRIB made it very clear that its only objection was to claiming that IRIB's property was so confiscated. IRIB stated it would object *if* Mr. Bourguet so testified (A1286-1287, A1271, A1274-1275). The trial judge stated that he would field objections as they were made (A1287). Subsequently, Mr. Bourguet did not testify that IRIB's property was confiscated and IRIB made no objection to his testimony. Then, on cross-examination, despite its earlier objection, IRIB itself asked Mr. Bourguet if he had any knowledge of the confiscation of government property. (He did not. A1319-1320). No other objection was stated. No mention of Fed. R. Civ. P. 44.1 or the issue now raised on appeal was made.

Mr. Bourguet's testimony was relevant and factual. In attacking Behroozian's testimony, IRIB attempted to portray life in Iran during 1979 as normal. Iran ridiculed Behroozian because he testified that his house was confiscated, because he testified that he fled Iran, and because he testified that he sought the help of a revolutionary guard in finding the violin, yet feared that the violin would be confiscated by a committee member. Given that IRIB was attacking Behroozian's credibility based on these very matters, Behroozian was entitled to show that these matters were not unusual in Iran in 1979. Mr. Bourguet did so. He described the confiscation, the competing factions, and the activities of the committees (A1294-1300).

Mr. Bourguet's testimony was credible. IRIB did not attempt to offer any testimony in rebuttal. IRIB did not make any attempt to contest Mr. Bourguet's credibility and referred to him in summation as "our distinguished French colleague." IRIB did not contest the substance of his testimony during the trial, nor has it done so on appeal.

Mr. Bourguet did not address any issue of law presented in the case. He did not testify about the ability of the Foundation to transfer title. His testimony was limited to circumstances in Iran, not the governing law.

Given IRIB's failure to object to Mr. Bourguet's testimony and the limits of Mr. Bourguet's testimony, the Court of Appeals properly held that his testimony did not usurp the court's function.

II. IRIB cannot complain of its own jury instructions.

IRIB succeeded in convincing the court to accept its legal theory regarding IRIB's right to reclaim its property from Behroozian, even if it had been sold to Behroozian by the Foundation (another agency of the same government), if IRIB proved that the violin had left its possession by unauthorized means.[5] The trial court so charged the jury, reading IRIB's proposed instruction verbatim. Then, after receiving a verdict it did not like, IRIB claimed for the first time on appeal that the trial court failed to instruct

[5] Typical of its distortion of the record is IRIB's representation that: "Iran's legal experts, Dr. Safai and Dr. Vafai, testified without expert contradiction that unless the Stradivarius was sold to the Foundation in accordance with the regulations, the Foundation had not acquired title and could not convey it." This is false. First, neither Dr. Safai nor Dr. Vafai testified at all. Dr. Safai, an employee of the Government of Iran, submitted a written argument. Dr. Vafai submitted a conclusory statement that Dr. Safai's argument was correct (A377-401, 748-749). Second, neither Dr. Vafai nor Dr. Safai discussed IRIB's regulations. Dr. Safai incorrectly relied upon Iran's General Accounts Law and the Regulations of Government Transactions, which did not apply to IRIB (A736). Inexplicably, IRIB relied upon its less than credible witness Khodapanahi to describe IRIB's own regulations and advance the claim that the transfer was not within these regulations (A1093-1094, 1098, 1148). Third, IRIB's "legal experts" were opposed with a variety of materials, including the relevant laws themselves. See, e.g., Defendants' Memorandum in Support of Requested Jury Instructions (A732-744) and the nine exhibits annexed thereto (which IRIB omitted from its Appendix in the Court of Appeals).

the jury on an essential issue, whether Behroozian could have obtained good title from the Foundation.

In a frivolous appeal, this a totally frivolous claim.[6]

IRIB did not object to the court's instructions pursuant to Fed. R. Civ. P. 51. In fact, the court read verbatim IRIB's proposed instruction on this issue (A1547-1549, 696). Accordingly, IRIB has no basis no raise an objection now. See, *Camalier & Buckley-Madison, Inc. v. The Madison Hotel, Inc.*, 513 F.2d 407 (D.C. Cir., 1975) ["The instruction attacked was authored and requested by Madison's trial counsel (not his counsel on appeal), with the result that Madison is hardly in position to complain." 420 fn. 93]; *Imperial Insurance, Inc. v. Employers' Liability Assurance Corp.*, 442 F.2d 1197, 1201 (D.C. Cir., 1970); *Hobson v. Wilson*, 737 F.2d 1, 31-32 (D.C. Cir., 1984), *cert. denied*, 470 U.S. 1084; and *Biscoe v. Arlington County*, 738 F.2d 1352, 1365 (D.C. Cir., 1984), *cert. denied*, 469 U.S. 1159.

IRIB also has nothing to object to. IRIB requested a charge it believed covered the title Behroozian could receive from the Foundation. It made it clear in argument that its proposed charge covered a transfer from the Foundation (A1387-1388, 1396, 1509, 1532, 1544, 1546), and IRIB's instruction did so. The jury was instructed:

> The rightful owner of property has a right to reclaim his property from either the person originally guilty of the unlawful taking or from anyone who subsequently comes in possession of it. The owner may recover the property from a person who purchases it in good faith from someone other than an owner since a thief cannot pass good title. (A1547-1548)

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[6] IRIB did not find this issue worthy of mention in its petition for rehearing to the Court of Appeals.

The Court of Appeals held that IRIB's instruction covered the issue raised by IRIB on appeal:

> The law regarding the Foundation's authority to transfer good title was embodied in the jury instruction proffered by the IRIB and ultimately tendered to the jury. Having failed to object to this instruction before the jury retired to consider the case, the IRIB may not now object to Mr. Bourguet's testimony or claim that its suggested instruction was erroneous. (839 F.2d 780, at 782)

There is no issue of "plain error." IRIB may now claim it wishes it worded its instruction differently but it cannot claim that no instruction was given on this issue.

CONCLUSION

The petition should be denied for the foregoing reasons.

Respectfully submitted,

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